Chapter 25 – IT Contract Formation

Chapter highlights

- **Purpose**: This chapter provides discussion of how to create an effective and well-prepared information technology (IT) contract document.

- **Key points**:
  - The formation of an effective contract starts while drafting the solicitation.
  - All IT contracts should promote excellence in supplier performance.
  - Due to the nature of technology procurement, and the many risks associated with these public investments, there are many specific contractual provisions that must be included in a technology contract which agencies do not normally use for non-technology purchases.
  - The lead procurement professional assigned to a technology contract is accountable for ensuring the inclusion of relevant federal and *Code of Virginia* contract provisions and any VITA-required IT specific contractual terms.

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25.0 Introduction

Every acquisition of information technology (IT) goods and services needs an appropriate contract. Every acquisition requires written technical, legal, administrative and financial agreements between the parties. Contract formation requires mutual consent to agreeable terms by both parties, generally manifested by an offer and acceptance. This chapter provides Virginia Public Procurement Act and VITA requirements and includes guidelines to cover the components of a successful IT contract.

The formation of an effective contract starts while drafting the solicitation.

All terms and conditions that the agency intends to include in the contract should be incorporated into a proposed contract that is included in the solicitation. If the agency attempts to insert substantive contract provisions after proposals are received or during negotiations, suppliers may need to revise pricing or other proposal elements. Agencies should always provide the desired resulting contract in the solicitation package.

25.1 Statutory provisions relating to contracts

There are certain types of contracts or potential suppliers which are prohibited by the *Code of Virginia* (refer to §2.2-4321.1). Those contracts and/or suppliers are as follows:

- No state agency shall contract for goods or service with a supplier or any affiliate of the supplier if the supplier fails or refuses to collect and remit sales tax or fails or refuses to remit any tax due. This will not apply if the supplier has entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or has appealed the assessment of the tax and the appeal is pending. Agencies may contract with these suppliers in the event of an emergency or if supplier is the sole source of needed goods and services. The Department of General Services shall post public notice of all prohibited sources on its public internet procurement website and on other appropriate websites.
- A public contract may include provisions for modification of the contract during performance, but no fixed price contract may be increased by more than 25% of the amount of the contract or $50,000, whichever is greater.
- Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term.
- Contract pricing arrangements: Public contracts may be awarded on a fixed price or cost reimbursement basis. Except in the case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost.

25.2 The offer

An offer is an expression of willingness to contract with the intention that the offer shall become binding on the party making the offer (the supplier) as soon as it is accepted by the party receiving the offer (the agency). An offer gives the agency the ability to form a contract by an appropriate acceptance.

An offer is not valid until received by the agency. If the offer has a stated time within which the acceptance must be made, any attempted acceptance after the expiration of that time will not be successful. Instead, the agency will be considered to have made a counter-offer that the original supplier can accept or reject. Generally, the time for accepting an offer begins to run from the time it is received by the agency. If there was a delay in delivery of the offer and the agency is aware of the delay, the usual inference is that the time runs from the date on which the agency would have received the offer under reasonable circumstances. If no specific time is stated within which the agency must accept, it is assumed that the supplier intended to keep the offer open for a reasonable period of time, to be determined based on the nature of the proposed contract, prior dealings, trade usage and other circumstances of which the agency knows or should know

Most Commonwealth solicitations require that an offer (bid or proposal) be valid for 90 to 120 days after the bid or proposal due date. This timeframe should accommodate the expected time for the agency to conduct evaluations, preparation of the contractual document, as well as any pre-award phases including steering committee and/or CIO and ITIB approval and receipt of any pending budget.

25.2.1 Revocation of an offer

An offer is generally revocable by the supplier at any time prior to acceptance. An offer may be revoked by any words that communicate to the agency that the supplier no longer intends to be bound by the offer. An offer is also revoked by any action by the supplier that is inconsistent with the intent to be bound once the agency learns of such inconsistent action. A revocation is effective upon receipt by the agency.

25.2.2 Termination of an offer

An agency cannot accept an offer under these circumstances:

- The death or insanity of the supplier, even without notice to the agency of such occurrence.
- The agency's rejection of the offer, which cannot be reinstated by the agency's subsequent attempted acceptance.
- The agency's counter-offer, which implies a rejection of the original offer.
- Revocation of the offer by the supplier.
- Expiration of the offer.

25.2.3 Rejection of an offer

A rejection of an offer is effective upon receipt by the supplier.

25.3 The acceptance

If an agency communicates more than one response to an offer, regardless of whether the rejection is sent before or after the acceptance, or if the rejection is received later than when the acceptance was dispatched, a contract is formed as acceptance is effective upon being sent. An offer invites acceptance by any means reasonable under the circumstances, unless specifically otherwise indicated by language or circumstances. A contract may be formed if the agency begins to perform, in lieu of making a verbal promise/acceptance and the supplier learns that performance has begun and agrees that performance can constitute acceptance. Also, if an agency receives benefits from goods or services that it knows or has reason to know are being offered with the expectation of compensation, and where it has a reasonable opportunity to reject them or has accepted those goods or services the agency is liable for the reasonable value or stated value of such goods or services.

25.3.1 Acceptance by silence

Silence may not constitute an acceptance except where, based on prior dealings between the parties, it is reasonable that the agency should notify the supplier if it does not intend to accept. Also, where the supplier has given the agency reason to understand that agency's acceptance may be manifested by silence or inaction, and the agency remains silent, that is tantamount to acceptance of supplier's offer.

25.3.2 Notice of acceptance

The supplier is entitled to notice of the acceptance. Thus, even if the agency effectively accepts an offer and a contract is formed, failure by the agency to notify the supplier of the acceptance within a reasonable time may preclude the supplier from enforcing the contract.

25.3.3 Notice of acceptance by performance

When an offer invites acceptance by performance, the supplier is not required to provide notice to accept the offer, unless the supplier so specifies. Agencies should not communicate acceptance by performance, but should always have a written contract document or purchase order which memorializes the terms of the transaction. In transactions for the sale of goods, where commencement of performance may be used to communicate acceptance, if the supplier is not notified of acceptance within a reasonable time, it may treat the offer as having lapsed prior to acceptance. However, if an agency has reason to know that the supplier does not have means of learning that performance has begun, the supplier's contractual duty will be discharged unless:

- The agency exercises reasonable diligence to notify the supplier of acceptance;
- The supplier learns of the performance within a reasonable time; or
- The offer indicates that notification of the acceptance is not necessary.

26.3.4 Notice of acceptance by return promise

Where the agency accepts by promise, the agency must exercise reasonable diligence to notify the supplier of the acceptance or ensure that the supplier receives the acceptance. All public body transactions should be memorialized by a written contract or purchase order.

26.3.5 When acceptance becomes effective

An acceptance becomes effective when:

- The supplier may specify when the acceptance will be effective.
- Absent the offer specifying when the acceptance is effective, acceptance is effective when sent, if sent by reasonable means.
- If an acceptance is sent by means that are not appropriate or reasonable under the circumstances or if it is improperly dispatched, the acceptance will be effective upon receipt.
- In the case of option contracts, an acceptance is not effective until received by the supplier.

25.3.6 Terms of acceptance

An acceptance is sufficient even if it contains additional or different terms from those offered, unless the agency expressly makes the acceptance conditional on the supplier's consent to the different or additional terms.

25.3.7 Acceptance of terms on packaging and in shrinkwrap and clickwrap

Standard terms presented on or within product packaging present special problems with respect to contract formation. When a shrinkwrap package containing a software program contains a printed warning stating that unwrapping the package constitutes consent to the terms of the license therein, those licenses terms may or may not be binding depending on the jurisdiction interpreting such licenses. Under UCITA, which has been enacted in Virginia, such software license terms are binding on the licensee. Where software is downloaded from the internet, with the licensee being required to click on the "I agree" button indicating agreement to the licensor's terms, such conduct is deemed to be a binding acceptance of the licensor's offer.

25.4 Forming an IT contract

25.4.1 The contract document

An IT contract can be a simple purchase order (PO) and include only eVA PO terms, be based on an invitation for bid (IFB) that has a nominal set of terms and conditions which are non-negotiable, or can be a negotiated agreement based on a complex request for proposal (RFP) process. VITA has developed and approved IT contract templates for IFBs and for contracts resulting from the RFP process. VITA has customized IT contract templates for the specific type of acquisition: IT Services, Commercial Off the Shelf Software (COTS), Solution, Hardware, Hardware Maintenance as well as a template, End User License Agreement (EULA) addendum. VITA procurement professionals are required to use the contract templates. Other agencies' procurement professionals must be trained in using these prior to use. Until that training occurs, agencies should use their own templates and apply the Minimum VITA Requirements for Agency Delegated RFPs/Contracts provisions in Appendix A, as appropriate, under their delegation of procurement authority from VITA.

Due to the complex nature of most technology procurements, as well the many risks associated with these large investments, there are specific contractual provisions that must be included in a technology contract which agencies do not normally use for non-technology

purchases. As an example, Appendix B includes the table of contents from VITA's approved contract template for the acquisition of a technology "solution."

Federal statutes and the *Code of Virginia* mandate the inclusion of certain contract provisions in all public contracts. VITA requires certain IT-specific contractual terms in VITA-issued and VITA-delegated contracts. The lead procurement professional assigned to a technology contract is accountable for ensuring the inclusion of relevant federal and *Code of Virginia* contract provisions and any VITA-required IT specific contractual terms. These terms are provided in subsections 25.5 through 25.7.

25.4.2 General guidelines for a successful IT contract

The key to success in forming any IT contract is setting and meeting the agency's and project's expectations. This can be accomplished by the designation of a joint steering committee to manage the contract's success; identifying individuals for both parties who will have responsibility for the project; continual dialog and open discussion of problems; keeping the contract up-to-date with an effective change-control process; and requiring the supplier to provide early and frequent progress reports in order to minimize the potential for surprises. According to IT contract experts, most IT contract troubles result from one of the following scenarios:

- Supplier makes unrealistic commitments (*e.g.,* performance guarantees, unachievable schedules, fixed price contracts without the required analysis) or supplier underestimates labor time, costs, risks.
- There is no firm contractual baseline (*e.g.,* unclear requirements, terms and conditions and statements of work) in the contract.
- The supplier does not manage the agency relationship (*i.e.,* the working relationship must be continually enhanced and problems must not be hidden).
- The contract does not contain a procedure and process for managing change. (*i.e.,* no formal change management process).

The following industry best-practice contract considerations should be taken into consideration when forming an IT contract:

- A successful IT contract will include all technical and administrative expectations and commitments from both parties. The contract should include procedures for quality reviews, testing, measurement of progress, performance capture and reporting, defect management, change request processing, upgrades and problem escalation. The agency should consider its needs with respect to supplier reliability, performance, functionality, compatibility, lifespan, support and cost.
- In order to reduce the likelihood of failure, the contract should be as specific as possible. Contract failure can be avoided by making sure both sides agree upon a common, written set of definitions, specifications, and time tables with regards to the services or systems being procured. As questions and issues arise, both sides can refer to and, if necessary, revise the document.
- The supplier looks to define its contractual obligations while the agency seeks to solve business issues. To deal with this difference in perspectives, the contract should include conflict and change provisions. For instance, the contract agreement might call for monthly meetings to review performance, problems and successes. This encourages supplier management and helps the parties deal with issues before they become major problems.
- The agency should monitor all IT contracts carefully, especially contracts for IT services. In most IT contracts, there is a service or support element involved, and suppliers should be held to their performance/response time contractual guarantees beyond the initial implementation period. If the supplier is not providing adequate service, if the

- Consider using shorter term contracts. Most contract prices are typically set for 3 or more years. To obtain better prices, agencies may want to consider negotiating short term (3 or 6 month) contracts. Adopting shorter time periods allows the supplier to be more certain about their costs. Suppliers will not be committing themselves to deliver significant discounts too far into the future. However, this method should not be used to the detriment of negotiating longer term contracts where it is prudent to lock in better out-year pricing. Adopting a shorter term contract is usually better for off the shelf software or hardware products than for a solution or service-based contract.
- All technology contracts should allow for a mechanism for making changes to the contract. Suppliers should consider how flexible they are prepared to be and the risks of flexibility. There is an advantage to suppliers in agreeing to a detailed service level agreement (SLA) that confirms what exactly their responsibilities are under the contract. Agencies may prefer less detail and would usually be happy if the SLA says simply that the supplier will supply all required IT services. A good SLA will reflect common sense project discussions and seek a balance of interests.
- Pricing may need to adapt to any changes in services or SLAs. In technology contracts pricing is often fixed price or time and materials. If prices are fixed over a period then price increases will need consideration (agencies should seek to limit increases to the rate of inflation). Both parties should agree ahead of time to specific expectations, promises, and contingencies. For example, system specifications should include not just the required functionality, but should also spell out any performance requirements or constraints, compatibility requirements, anticipated lifespan, and acceptable levels of defects.
- Both parties should clearly and unambiguously define key terms, conditions, and activities such as the meaning of "beta testing" or the standards for determining whether the agency has accepted the system. In the IT world, accepting a system can occur at many different times, such as when it has passed a series of agreed-upon tests ("acceptance testing") and has been in operation for a certain period of time with no serious defects. If all parties are not willing to define acceptance, that's a strong warning sign that a dispute may emerge. However, the exercise of creating an SLA may flush out potential problem areas well in advance of any signing, payment, or delivery.
- All time references should be specific dates. Avoid the use of "reasonable time" or "promptly" and be specific in each party's requirements under the contract. i.e. "within three days after (some point in time; i.e., contract award date)."
- If formulas are used within the agreement make sure that they work.
- Do not use vague references such as "prepared to our satisfaction," "in a timely manner," would reasonably be expected to." It is difficult to determine when a supplier "has performed in a timely manner."
- Avoid using words like "materiality" and "solely" unless definitions are included.
- Carefully select use of the words "shall" (mandatory) and "may" (permissive).

Finally, VITA recommends that all contract documents go up and down the chain of command in both parties' organizations as needed to make sure all relevant personnel understand what is promised and what is expected and that the final contract includes all. Additionally, VITA's Project Management Division provides many helpful tools including an IT glossary for IT-based terminology to drive consistency throughout the Commonwealth.

25.5 *Code of Virginia* contractual requirements

The *Code of Virginia* requires that certain language and requirements be included in every public body contract. In addition, there is other contract language that is required to be

included in public body contracts through either policy or by an Executive Order of the Governor. The following subsections include those requirements.

25.5.1 Insurance

Whenever work is to be performed on State owned or leased facilities, the supplier is required to have insurance required by law and the agency or institution's regulations to perform the type of work required. This includes Workers' Compensation, Employer's Liability, Commercial General Liability and Automobile Liability. Technology contracts, especially for services and software development, design, installation and/or integration efforts, should include Professional Liability/Errors and Omissions insurance coverage. The amount required could be as small as $1 million per occurrence or higher, depending on the complexity and criticality of the project and potential for loss to the Commonwealth.

Stipulated insurance must be obtained prior to contract award and be maintained during the entire term of the contract. It is a best practice for an agency to require that the supplier provide the certificate(s) of insurance prior to the provision of any goods and services or the commencement of any work. Copies should be maintained in the procurement file.

25.5.2 Employment discrimination by supplier prohibited

Refer to §2.2-4311. “All public bodies shall include in every contract of more than $10,000 the following provisions:

1. During the performance of this contract, the contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over $10,000, so that the provisions will be binding upon each subcontractor or vendor.”

25.5.3 Drug free workplace to be maintained by supplier

Refer to §2.2-4312. “All public bodies shall include in every contract over $10,000 the following provisions:

During the performance of this contract, the contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that

the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over $10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, 'drug-free workplace' means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract."

25.5.4 Payment clauses to be included in contracts

Refer to §2.2-4354. "Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include:

1. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

2. A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.

3. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.

4. An interest rate clause stating, 'Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month.'

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge."

25.5.5 Technology Access Act

As required by the Information Technology Access Act (§2.2-3500 et seq. of the *Code of Virginia),* all contracts for the procurement of information technology goods by, or for the use of, state agencies and institutions shall include the technology access clause developed

by the Secretary of Technology. In addition, specifically, §2.2-3503 of the *Code of Virginia* provides:

"A. The technology access clause specified in clause (iii) of §2.2-3502 shall be developed by the Secretary of Technology and shall require compliance with the nonvisual access standards established in subsection B of this section. The clause shall be included in all future contracts for the procurement of information technology by, or for the use of, entities covered by this chapter on or after the effective date of this chapter.

B. At a minimum, the nonvisual access standards shall include the following: (i) the effective, interactive control and use of the technology (including the operating system), applications programs, and format of the data presented, shall be readily achievable by nonvisual means; (ii) the technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom the blind or visually impaired individual interacts; (iii) nonvisual access technology shall be integrated into networks used to share communications among employees, program participants, and the public; and (iv) the technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired. A covered entity may stipulate additional specifications in any procurement.

Compliance with the nonvisual access standards shall not be required if the head of a covered entity determines that (i) the information technology is not available with nonvisual access because the essential elements of the information technology are visual and (ii) nonvisual equivalence is not available."

Visit this website: www.access-board.gov for federal information regarding technology accessibility and VITA's website: Home - IT Accessibility for Commonwealth requirements.

25.5.6 Section 508 compliance

Section 508 of the Rehabilitation Act of 1973 was strengthened in the Workforce Investment Act of 1998. Its primary purpose is to provide access to and use of Federal executive agencies' electronic and information technology (EIT) by individuals with disabilities. The statutory language of section 508 is available by accessing http://www.section508.gov. VITA's policies regarding Section 508 can be found at this website: Home - IT Accessibility.

Section 508 requires Federal agencies to ensure that their procurement of information technology takes into account the needs of all end users – including people with disabilities. The goal of section 508 is that information technology will be compatible with assistive technology. For most products, such as software, web pages, and computers, achieving compatibility with assistive technology is the goal of Section 508.

Section 508 does not require suppliers to manufacture information technology to meet Section 508's Access Board's standards, with certain exceptions. However, because Section 508 requires the government to purchase IT that meets the applicable technical provisions set by the Access Board, there is an incentive for IT manufacturers and designers to ensure that their products are usable by everyone – including persons with disabilities. Section 508 does not impose requirements on suppliers or subcontractors. Instead, it only imposes requirements on the product specifications of IT procured by agencies. Prime suppliers may enter into subcontracts in the performance of a contract for IT, but the prime supplier will remain obligated to deliver 508-compliant goods and services under the contract.

Under §2.2-2012, all IT procured by VITA or any executive branch agency must comply with the accessibility standards of the Rehabilitation Act of 1973. The one exception to IT accessibility compliance is if an agency submits a written explanation of why, and to what extent, the standards impose an undue burden or exception.

25.6 Federal contractual requirements

There are certain federally mandated clauses which are to be included in all agency IT contracts if there is a possibility that federal funds may be used to procure any product or service from the contract. The assigned agency procurement professional should ensure that all federal flow-down terms are included in any procurement using federal funds. The clauses are as follows:

25.6.1 Civil Rights Clause

"The bidder, with his signature on this proposal, HEREBY AGREES THAT he will comply with the title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, national origin or sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the bidder receives Federal financial assistance and HEREBY GIVES ASSURANCE THAT he will immediately take any measures necessary to effectuate this agreement."

25.6.2 Anti-Kickback Clause

Read section 52.203-7 of Subpart 52.2 of the *Federal Acquisition Regulation*. This certification is also required to be in the solicitation for which the contract award is made: "The offeror, by signing its offer, hereby certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on its behalf in connection with the awarding of this contract."

25.6.3 Clean Air Act

"Supplier hereby agrees to adhere to the provisions which require compliance with all applicable standards, orders or requirements issued under Section 306 of the Clean Air Act."

25.6.4 Energy Policy and Conservation Act compliance

Read Subpart 23.2 of the *Federal Acquisition Regulation*.

25.6.5 Anti-Lobbying Act

For more information read the Lobbying Disclosure Act of 1995. Appendix C provides the Lobbying Certificate that VITA requires suppliers to sign prior to contract award. This signed form is then retained in the procurement file. The following provision must be included in VITA-issued contracts: "Supplier's signed certification of compliance with 31 USC 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder (together, the "Lobbying Act") is incorporated as Exhibit -- hereto."

25.6.6 Debarment Act compliance

Read Subpart 52.209-6 of the *Federal Acquisition Regulation*. VITA recommends:

- The following language be included in the "Termination for Breach or Default" provision of the contract: "If Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 USC 1352 or if Supplier becomes a party excluded

from Federal Procurement and Nonprocurement Programs, VITA may immediately terminate this Contract, in whole or in part, for breach, and VITA shall provide written notice to Supplier of such termination. Supplier shall provide prompt written notice to VITA if Supplier is charged with violation of 31 USC 1352 or if federal debarment proceedings are instituted against Supplier.

- This language be included in the "Ordering" provision of the contract: "Notwithstanding the foregoing, Supplier shall not accept any order from an Authorized User if such order is to be funded, in whole or in part, by federal funds and if, at the time the order is placed, Supplier is not eligible to be the recipient of federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs.

25.7 VITA contractual requirements

VITA requires that all statutory requirements be included in any IT contract whether issued by VITA or when delegated to an agency for issuance (refer to chapter 1 of this manual for more information insert link). VITA's website links provide core contractual terms and required eVA terms and conditions. These are updated annually to incorporate statutory changes.

25.7.1 Requirements for SCM strategic sourcing professionals

VITA-required and recommended contract provisions, as well as active links to the core contractual terms and eVA terms and conditions, are included in VITA's templates. The templates and other forms and tools are accessible for use. Users should open these documents and "save as" for the user's project. It is important to "open/save as" for every new procurement, rather than using an existing user contract document to customize for the new procurement, to ensure use of the current template version. These templates are scheduled for quarterly updates. If questions arise about which template is best-suited for a particular procurement, please contact the Manager, Strategic Sourcing or a Policy and Compliance Specialist. The following table offers general guidelines on which template to use for different types of IT procurement:

Description of procurement	Use this template	Comments
Licensed Services, including access to application(s), web-hosting and any related products and services	ASP solution	
Hardware or equipment and maintenance/support	Hardware and maintenance	Include the warranty worksheet, which allows a supplier to identify its standard warranty and maintenance offerings
Licensing of COTS software and purchase of maintenance/support for the software, including upgrades	Software off the shelf	
IT services, not to include any software development	Services	
Maintenance/support services for COTS or custom-developed software, including upgrades but no new licensing	Software maintenance	
Custom software, any software development services, systems	Solution	If hardware is involved in the system, use both this template and the hardware and maintenance

development, software-based systems, projects involving software and where work product will result		template
Value-added reseller (VAR) products	Supplier Contract Addendum ("EULA Addendum")	This is not a contract template. It should be included as a solicitation attachment. It is VITA's practice to consider supplier-provided language ONLY when the supplier is a reseller of the software, or when the software is an integral part of the supplier's product, and the supplier does not have the right to license the software itself (e.g., when a software licensor requires the VAR supplier to pass through the licensor's terms and conditions). The solicitation must state that VITA requires the software licensor to execute this addendum to address terms and conditions in their license agreement which VITA, as a government entity, by law or by policy, cannot agree to. It is the supplier's responsibility to secure the software licensor's consent to this addendum or to other terms and conditions acceptable to the Commonwealth.

25.7.2 Requirements for delegated agency procurement professionals

Commonwealth agencies will not be able to use VITA contract templates until training on them is completed. In the meantime, agencies desiring CIO approval or delegation authority to issue IT contracts (and solicitations) must include the minimum elements shown in the table below:

Area	Provision	Objective
Intellectual Property	Warranty	Supplier has right to convey title/license free of claims of infringement, conversion by third parties.
Intellectual Property	Indemnification	Supplier will indemnify, defend and hold CoV harmless against claims of infringement by third party. Indemnification is unilateral. The Commonwealth does not indemnify suppliers
Intellectual Property	License Scope	Licenses should be perpetual, world-wide and transferable.
Intellectual Property	License Scope	Software licenses should allow for: 1. use by agents/contractors; 2. is transferrable (ideally unlimited or at least among CoV agencies and to third party agents solely to serve CoV). If using VAR, then use EULA or similar modification to shrink-wrap license.
Intellectual Property	Work Product	If engagement produces work product paid for by CoV, CoV ideally has ownership or at least worldwide, perpetual license to use and distribute source code without limitation. If work

		product contains pre-existing supplier IP, that IP ownership may be retained for only the pre-existing portion. Also, if the project uses federal funding, there may be intellectual property requirements.
Limitations of liability		Supplier's liability for indemnification and confidentiality obligations are unlimited for both direct and consequential damages, in addition to commercial liability provisions.
Mandatory terms	Core Contractual Terms	Should be incorporated by reference. Remove any duplication or full-text of same in agency contract template.
Security terms	VITA's Information Security Policies & Guidelines	Should be incorporated by reference. These do not conflict with any agency-specific facility access requirements.
Escrow		Escrow is optional for software based on criticality of the application, but, if included, SCM will review the escrow agreement. Source code should be released if supplier: 1. enters bankruptcy (include reference to §365 of B'cy Code to keep outside of trusteeship); 2. becomes insolvent; 3. abandons support for the application.
Warranties		In addition to commercial warranties, contract should include IT-specific warranties: 1. ownership of intellectual property (see above); 2. absence of malicious code in software; 3. non-infringement; 4. disclosure of open source.
Performance/ remedy		Intermediate remedies [other than outright termination] for breach, sub-standard performance should be included to give agency appropriate leverage with supplier.
Transition period		As a best practice, contracts for technology services should provide for a post-contract transition period to support migration to a successor service or platform. Typically transition periods last up to 6 months, at the customer's discretion, but the term and scope of such a period are mission-dependent.
Maintenance/ upgrades		Software, hardware and occasionally service agreements that generate deliverables will require ongoing maintenance and support. Support provides trouble resolution, while maintenance typically includes product upgrades released by the vendor to its customers. Support typically includes response and resolution intervals with escalating remedies based on factors, such as repetition and severity. Support is often priced as a percentage of the purchase price; it should be calculated at the price after any discounts and typically falls in the range of 10%-20% of the purchase price. Although suppliers typically are allowed to increase support and maintenance costs, such increases should be capped on a year-to-year basis, using an absolute percentage cap (3%-5%) or inflation index.

This manual results from the directive provided in paragraph 5 of §2.2-2010 of the *Code of Virginia*, which reads: "VITA shall […] (5) Develop and adopt policies, standards, and guidelines for the procurement of information technology and telecommunications goods

and services of every description for state agencies," therefore, the provisions of the Virginia Department of General Services, Division of Purchases and Supply' *Agency Purchasing and Surplus Property and Vendor's Manual* do not apply to VITA-issued or delegated contracts. When VITA has delegated authority to an agency for a technology procurement, any language that conflicts with this manual should be removed from the agency's contract document(s).

VITA recommends that all contracts submitted to VITA or the CIO for review and approval include the following qualities to improve the turnaround time for the agency:

- Be free of typographical, spelling and formatting errors.
- Be free of duplications and conflicting language/terms.
- Include all mandatory provisions required by the *Code of Virginia* and any Federal flow-down requirements.
- Include a completed version of the matrix in Appendix A as a document separate from the contract to facilitate VITA review.
- Include all document exhibits that comprise the whole contract.
- Be already reviewed by the agency's OAG representative, if necessary.
- Be submitted electronically in Microsoft Word format to the agency's then-current designated PMD representative.

Agencies may obtain assistance in developing a technology contract by emailing a request to: scminfo@vita.virginia.gov.

25.7.3 Requirements for promoting supplier performance

§2.2-2012 of the *Code of Virginia* states: "Procurement of information technology and telecommunications goods and services; computer equipment to be based on performance-based specifications."

All IT contracts should promote excellence in supplier performance. When an agency enters into a contract, it forms a relationship with a private-sector supplier to accomplish a public purpose. Measuring and recognizing a supplier's performance as part of the contract, combined with the agency's management of the supplier's performance will provide greater value for the Commonwealth and taxpayers. In order to emphasize excellence in supplier contract performance, VITA recommends that all IT contracts include the following:

- Agency and project performance expectations and objectives.
- Procedures for systematically gathering and using ongoing performance data on supplier's performance during the term of the contract.
- Built-in incentives/remedies attached to supplier performance.

During contract negotiations, work with the supplier on establishing partnering programs and measurable goals for reducing administrative burdens on both parties while ensuring supplier performance and value. Include negotiated goals into the contract. Always make agency satisfaction with the supplier's performance an on-going measurement during the term of the contract.

The type of performance data will be determined by the type of procurement. For instance, a contract for maintenance support will require a service level agreement with monthly reporting on supplier's service performance in order to tie remedies to payment via a percentage discount. A solution and implementation driven procurement should include sequential milestones or deliverable submissions and gear remedies to on-time delivery and/or acceptance criteria. For a contract with a Value Added Reseller (VAR) or for an off

the shelf IT commodity procurement, availability and delivery may be performance drivers. Please refer to chapter 21 of this manual, Performance-Based Contracting, Statements of Work and Service Level Agreements (insert link), for a more in-depth discussion. Here are the key points from that chapter:

- Performance-based contracting (PBC) is a procurement method that structures all aspects of the procurement around the purposes of the work to be performed instead of describing the manner by which the work is to be performed.
- The most important element of a PBC, and what distinguishes it from other contracting methods, is the results that are desired.
- The agency should determine at least one performance indicator and standard for each task and deliverable and link them to a description of acceptable quality.
- Performance incentives may be positive or negative and may be monetary or non-monetary—based on cost control, quality, responsiveness or customer satisfaction.

The contract should include detailed performance specifications or expectations, describe an issue resolution process and include specific incentives or remedies.

Agencies should consider the following questions and integrate them into the contract from what was included in the solicitation and negotiated, if applicable, with the supplier:

- What does the project need (product specifications, service turnaround, etc.) to satisfy the end user(s)?
- How quickly must the supplier correct each failure? What are the agency's remedies if supplier does not correct the failure within the specified time?
- What measurement and enforcement tools and processes will be implemented to ensure that performance can be measured and enforced?
- What financial or other incentives or remedies are needed by the agency?
- Does the agency have the ability to get out of the contract without penalty if the supplier is not meeting its service level obligations?
- How important is it to the agency for the supplier to provide "transition services" while an agency is trying to procure a new supplier?

25.8 VITA recommendations for a successful IT contract

Below are discussions and guidance on typical IT contract elements. While some of these are common elements in all contract documents, this discussion is focused on a technology perspective.

25.8.1 IT Scalability

Scalability (the ability to expand an application or use of hardware) is often a significant issue in complex IT transactions. Agencies should watch for data interoperability issues. If scalability may be a possible issue in an agency IT contract, the agency should be sure to obtain a warranty regarding scalability of applications and data interoperability.

25.8.2 Material breach provision in IT contracts

Most contracts allow a party to terminate the contract for the other party's "material breach." It is often difficult to determine whether a particular set of facts amounts to "material breach." Agencies should identify key scenarios which would constitute "material breach" and include those in the IT contract. If repeated small breaches could also constitute a "material breach", the IT contract should include that language. Commonwealth agency contracts usually provide that the supplier should not have a right to terminate for breach for any reason, particularly for a mission critical application or solution. If the supplier has the right to terminate the contract, the impact to the agency, project or

Commonwealth as a whole, could be paramount, because our common goal is uninterrupted business on behalf of the citizens. If there is a material breach, outside of payment disputes, the agency and the supplier should work to cure the breach and, if necessary, escalate the issue.

25.8. 3 Related services provision in IT contracts

The work to be performed under the contract should be described in detail in the statement of work (SOW). When the SOW is not enough, agencies could include a related services clause in the IT contract, such as the following:

25.8.4 Source code escrow

If there is a potential need to obtain source code for an application if the supplier is unable to support it (bankruptcy, cessation of support of the product, etc.), the contract should provide for a source code escrow. Source code escrow provisions should identify the escrow agent, when must supplier make escrow deposits (initial and on-going), the triggers under which the escrow agent will release the source code to the agency (insolvency, failure to support, sunset of the application, breach by supplier, etc.) and any and all payment terms. The supplier may have its own agent and escrow agreement form. Agencies should carefully review any such agreement before incorporating it into the contract or signing it. Ideally, an escrow agreement should be negotiated prior to contract execution so the agency can uphold its best interests on behalf of the Commonwealth.

25.8.5 Key IT supplier personnel

The IT contract should identify the supplier's key personnel and also include under what circumstances supplier would be able to replace such key personnel. In addition, if the agency would like background and security checks on supplier's personnel, as well as the right to interview or demand replacement of such personnel, those provisions should be specifically included in the agreement. This provision is of special value in a large and/or complex IT project.

25.8.6 Alternative dispute resolution (ADR) provision in IT contracts

If the agency and the supplier have agreed to submit all contractual disputes to ADR, the agreement should specify what rules apply, how the mediator(s) will be chosen, as well as where the mediation will take place. Also, escalation procedures should be included in the event the first mediation is not successful, timeframes for escalation and the parties to be involved. If the agency does not have its own ADR process and VITA has delegated authority for the procurement, VITA's ADR process may be used by the parties if so stated in the IT contract.

25.8.7 Force majeure in IT contracts

A force majeure ("a greater force") event excuses a party's failure to perform when failure results from some circumstance beyond a party's reasonable control (be careful of "labor and supply shortages" being included in the definition of force majeure in the agreement, since these often are based on business circumstances over which the supplier actually does have some control). The force majeure language defines when each party's obligation to perform is deemed to be "suspended." Agencies should include a clause that gives them the right to terminate the contract if force majeure continues for a certain period of time—typically 30 days, though a shorter period would be appropriate for a mission-critical system.

25.8.8 Disaster recovery provision in IT contracts

IT contracts where the supplier has network or operational responsibilities should include a disaster recovery plan (back-ups, hot-site, cold site) and detail supplier's responsibility to

provide full or partial restoration, to participate in disaster simulation exercises and the frequency of such responsibilities. The contract should also provide a timeframe for returning the agency to normal service levels following the disaster.

25.8.9 Termination of IT services

Agencies should strive to obtain a contractual commitment from the supplier that the supplier will not suspend services except in the most limited circumstances. Agencies should try to negotiate an exception to the typical limitation of liability clause in the IT contract to include damages caused by a supplier's suspension or cancellation of services. For example, those damages might include the cost of finding a replacement service. Any revenue commitment in the agreement should also be reduced by an amount equal to or greater than the revenue generated for the supplier from the cancelled service if the supplier will continue to provide other services under the contract.

It is important to include "transition assistance" language within the IT contract. For instance, if the contract is not renewed or terminated or if work on a project is terminated for any reason, the supplier is responsible to provide reasonable transition assistance to allow for the expired or terminated portion of the services to continue without interruption or adverse effect and to facilitate the orderly transfer of such services to the agency. Here is language from VITA's contract templates, customized for agency use:

"Prior to or upon expiration or termination of this Contract and at the request of Agency, Supplier shall provide all assistance as Agency may reasonably require to transition Name of Project/Contracted Services to any other supplier with whom Agency contracts for provision of a Project services. This obligation may extend beyond expiration or termination of the Contract for a period not to exceed six (6) months. In the event of a termination for breach and/or default of Supplier, Supplier shall provide such assistance at no charge or fee to Agency; otherwise, Supplier shall provide such assistance at the hourly rate or a charge applicable under the Agreement or as otherwise agreed upon by Supplier and Agency."

25.8.10 Maintenance needs in IT contracts

The contract should clearly state the manner of maintenance/support to be provided and identify who to contact for service and/or repair. The contract should also include severity levels, an agreed upon acceptable response time for the supplier, the level of maintenance/support to be provided, as well as the billing structure for such services. The contract should also include a notification/escalation process for the resolution of errors, deficiencies or defects, including the method of notification to the supplier, acceptable response time and the agency's recourse if the supplier's action does not correct the problem or is not acceptable to the agency.

25.8.11 IT documentation and training needs

The IT contract should describe responsibilities of both parties regarding user manuals, technical support manuals, application documentation and training materials. The IT contract should include the due dates of all such materials, format and level of detail of the materials to be provided under the contract. All training needs should be specifically described in contract including the nature and extent of training to be provided by the supplier as well as the location, timeframe and cost of training.

25.8.12 IT hold harmless clauses

This language addresses the issue of who pays when there is a claim for damages arising out of the work performed or a product provided under an IT contract. A hold harmless clause is an indemnity clause and is to be included in all IT contracts. Under an indemnity clause, the supplier agrees to indemnify, defend and hold harmless the agency, its officials

and employees from and against any and all claims, proceedings, judgments, losses, damages, injuries, penalties and liabilities of, by or with third parties. Additional information about indemnification is provided in subsection 25.8.20.

25.8.13 Liquidation costs and completion penalties in IT contracts

If the supplier's failure to deliver on time will adversely affect an agency's capacity to perform its business function, a liquidated damages clause should be included in the contract. This clause will establish the method for computing the reimbursement to an agency for costs incurred due to the failed delivery of the IT product or service. This may be linked to service level requirements or acceptance testing failure.

25.8.14 Liability limitations in IT contracts

In the private sector, most IT contracts contain language which limits the liability of the supplier to some multiple of the value of all payments made under the contract. As agencies rely heavily on their IT suppliers to assist in providing essential government services to citizens, limiting a supplier's liability may not be as appropriate. When preparing the IT contract, the agency should evaluate the true risk involved should the supplier fail to perform or deliver. Agencies should take care to limit risk in its IT procurements through good contract scoping, specifications, good statements of work and supplier and contract management.

- **Liability for direct and indirect damages:** Hold suppliers responsible for *direct* damages arising out of an IT contract. Do not hold suppliers responsible for third party claims arising out of *indirect* damages, with certain exceptions, including infringement of a third party's intellectual property or willful misconduct by the Supplier. Unless responsibility is specifically allocated to the supplier in the contract, the agency should not hold supplier responsible for indirect damages, including special or consequential damages. Example: Supplier should not be liable for lost data, unless the contract specifically provides for supplier responsibility for lost data in the contract.

- **Amount of liability limitations:** Supplier liability should be limited according to the IT contract risk. Liability limitations in excess of 2X the total amount of the contract could be warranted for high risk contracts, such as contracts for agency IT systems that involve public safety. If a contract contains a liability limitation that is a multiple of the total amount of the contract, then the agency and the supplier should specifically address in the contract how the "amount of the contract" is calculated. This is especially important where the contract has an extension clause or unique funding mechanism. Even if a limitation of the supplier's liability is included, the contract should exclude unlimited liability for infringement of a third party's copyrights or patents from that cap. A limitation of the supplier's liability also should not cap the amount of supplier's liability for property damage, death and bodily injury, suffered either by the agency and its employees or that might be brought as a claim by a third party.

25.8.15 Assignment of IT contracts

Agencies will want broad rights to assign the contract (or license) in their IT contracts. This allows them to transfer technology resources to other agencies or even to outside contractors who are providing them with services. Suppliers often want to prohibit such assignments to encourage sales or to prevent technology from falling into the hands of competitors. IT contracts should allow agencies to assign agreements to other agencies and to those contractors providing them with services, provided that the contractor may only use the technology to provide services to the agency, not to its other customers. It is best to have this right without requiring the advance agreement of the supplier. Most assignments should provide that the Commonwealth or agency has the right to assign the

contract or license upon giving notice to the supplier. Although it can create extra work for managing suppliers, it is not uncommon to have a contract provision requiring a customer to notify a supplier of an assignment, even if the supplier's consent is not required.

25.8.16 IT performance bonds

Although performance bonds (a surety bond issued by an insurance company to guarantee satisfactory completion of a project by a supplier) are usually used in construction or transportation contracts, The *Code of Virginia* (§2.2-4339) provides that a public body may require a performance bond for contracts for goods or services if provided in the IFB or RFP. For example, a supplier may cause a performance bond to be issued in favor of the agency for whom the supplier is developing and implementing a major IT solution. If the supplier fails to develop and implement the solution according to the contract's requirements and specifications, most often due to the bankruptcy of the supplier, the agency is guaranteed compensation for any monetary loss up to the amount of the performance bond.

Performance bonds are contracts guaranteeing that specific obligations will be fulfilled by the supplier. The obligation may involve meeting a contractual commitment, paying a debt or performing certain duties. Under the terms of a bond, one party becomes answerable to a third party for the acts or non-performance of a second party. Performance bonds are required in a number of business transactions as a means of reducing or transferring business risk. State agencies may require a performance bond for the purpose of reducing public responsibility for the acts of others, and the courts require bonds to secure the various responsibilities of litigants, including the ability to pay damages.

A typical performance/surety bond identifies each of three parties to the contract and spells out their relationship and obligations. The parties are:

- **Principal** or the party who has initially agreed to fulfill the obligation which is the subject of the bond. (Also known as the obligor/contractor/supplier.)
- **Obligee** or the person/organization/agency protected by the bond. This term is used most frequently in surety bonds.
- **Guarantor** or **Surety** or the insurance company issuing the bond.

The performance bond binds the Principal to comply with the terms and conditions of a contract. If the Principal is unable to successfully perform the contract, the surety assumes the Principal's responsibilities and ensures that the project is completed.

Performance bonds must be in an amount at least equal to 100% of the accepted bid or proposal and should be filed 10 days prior to issuance of the notice of award unless a written determination is made that it is in the best interests of the agency to grant an extension. A certified check or cash escrow may be accepted in lieu of a performance bond. If approved by the Attorney General, a supplier may furnish a personal bond, property bond, or bank letter of credit in the face amount required for the performance bond. Approval shall be granted only if the alternative form of security offered affords protection equivalent to a corporate surety bond. If a performance bond requirement is not stated in the solicitation and the agency later determines that a bond is needed prior to contract award, the supplier to whom the award will be made shall provide a performance bond, and the agency will pay the cost of the bond.

In IT contracts, a performance bond may be in addition to the errors and omissions (E/O) insurance requirement, but never in place of it, as E/O insurance is a professional liability insurance that covers just what the term implies, but not remuneration for a supplier bankruptcy situation.

25.8.17 The IT statement of work

A strong statement of work (SOW) should define precisely, clearly and completely all the obligations of the parties with respect to the IT effort to be performed. The SOW details what the supplier agrees to do, what the agency agrees to do, the instructions to the supplier and the technical, functional and performance and reporting requirements and specifications of the contract. All SOWs must be in writing and agreed to before any work begins. The SOW should be an exhibit to the contract. The SOW should be sufficiently detailed so that a person who is unfamiliar with the contract will be able to clearly see everything that is included and what is not. Please refer to manual chapter 21, Performance-based Contracting, SOWs and SLAs (insert link) and chapter 12, SOWs for IT Procurements (insert link) for more in-depth discussion and details on creating effective and complete SOWs. A strong SOW should include the following elements, as applicable to the procurement:

- A detailed statement of the purpose, objective or goals to be undertaken by the supplier.
- Limitations of the services being provided.
- An identification of all significant material to be developed by supplier and delivered to the agency.
- Project reporting requirements (i.e., project status, sales status, monthly/quarterly, service level/performance). SWaM and IFA sales reporting do not need to be included in the SOW if they are elsewhere in the contract document.
- List of all deliverables with due dates and submission requirements.
- Estimated time schedule and/or milestones for the provision of products/services by the supplier.
- If not a performance-based contract, include the methodology for how the products/services will be provided.
- Travel and meeting attendance requirements.
- Testing requirements.
- Completion/acceptance criteria for the work to be performed.
- Maintenance that will be provided.
- Support that will be provided.
- Service level requirements.
- Name/Identification of supplier personnel to be assigned, if specific personnel are key to the engagement. (Some may also require job classification or skill level of the personnel to be made available by the supplier.)
- Supplier work hours required to accomplish the purpose and goals.
- Invoice procedures, if not in the contract document.
- Supplier's total cost if not included in the contract's pricing schedule (perhaps in a new purchase order situation). Scope of work must have breakdown of costs, including billing rates. Divide the supplier services into billable tasks or billable units such as price list of equipment or supplies or a list of hourly rates for services.
- Safety and liability issues.
- List of required specifications and any supplier professional certifications or licenses.
- Place of performance (agency onsite, supplier location, other)
- Special work hours, if any.
- The agency's responsibilities, such as facilities, equipment for supplier performance and information, data, documentation to facilitate the supplier's performance.
- Any special security requirements; i.e., transmittal of data, government facility access, etc.

25.8.18 IT confidentiality agreements

Parties to IT contracts frequently enter into confidentiality agreements before the contract is signed. Any consultant or supplier who has access to sensitive agency data must agree to

treat that data as confidential, whether it is personally identifiable employee or agency data, agency lists, marketing plans, nonpublic financial information or trade secrets. In many cases, an agency may need to disclose some of this information to an IT supplier before the contract for the project has been signed. Confidentiality protection requires more than just a good written agreement. When an agency needs to protect certain information, employees need to be educated not to make unnecessary disclosures. Where the confidentiality agreement calls for marking or otherwise identifying information as confidential, employees must be sure to so identify the information as confidential. It is also important to keep complete and accurate records of who has access to the information and how it is used. Below is a comprehensive contractual definition of "confidential information:"

"As used herein, the term "Confidential Information" of agency means all information that supplier may receive from the agency, its employees, agents or representatives, prior to or on or after the date hereof, which is not generally available to the public, including but not limited to agency lists, proposed or planned products or services, marketing plans, financial and accounting records, cost and profit figures, forecasts and projections and projections and credit information."

- **Identifying confidential information:** If the agency desires that the confidentiality agreement be more restrictive, it can require that each item that is disclosed be specifically identified as being "confidential" in order to be within the scope of the agreement. Here is one example of such a clause:

  "If the Confidential Information is embodied in tangible material (including without limitation, software, hardware, drawings, graphs, charts, disks, tapes, prototypes and samples), it shall be labeled as "Confidential" or bear a similar legend. If the Confidential Information is disclosed orally or visually, it shall be identified as such at the time of disclosure, and be confirmed in a writing within thirty days of such disclosure, referencing the place and date of oral or visual disclosure and the names of the employees of the receiving party to whom such oral or visual disclosure was made, and including therein a brief description of the Confidential Information disclosed." It may make sense for an agency to include as confidential information "all oral and written information that an objective observer would consider confidential taking into account the surrounding circumstances." In other words, did the recipient have reason to believe the information he or she saw (rather than information actively supplied to him or her) might be confidential?

- **Extent of the nondisclosure obligation:** The core of any confidentiality agreement is the clause that obligates the receiving party to treat the received information as confidential. This clause can be drafted in any number of ways.

  Here's an example of an expansive confidentiality provision:

  "Except as set forth herein or as otherwise agreed by the parties in writing, each Recipient shall at all times, both during and after the Disclosure Period: (i) not disclose any Confidential Information of the other party or its affiliate to any person other than the Recipient's employees or representatives who need to know such information; (ii) use the same care and discretion to avoid disclosure as the Recipient uses with respect to its own confidential information; (iii) not use any Confidential Information in the Recipient's business, nor develop, market, license or sell any product, process or service based on any Confidential Information; and (iv) not modify, reverse engineer or create derivative works based on any computer code owned by the other party or its affiliate."

The clause includes both a nondisclosure and nonuse obligation. It specifies a level of care that the recipient uses with respect to its own confidential information, and it restricts the recipient from reverse engineering the disclosing company's software or creating derivative works. A variation might include an absolute obligation not to disclose, rather than an obligation to exercise a defined level of care to avoid disclosure. Depending on the importance of the information being protected, an agency may consider including a detailed security requirements addendum. Another way of limiting the use of the information would be to say that the recipient may "use the information only for the purpose for which it was disclosed, or otherwise solely for the benefit of the Discloser." The clause also restricts the range of parties to whom the recipient may disclose to the recipient's employees or representatives who need to know such information. Some agreements add that any such employees or representatives must be under a similar obligation of confidentiality. At a minimum, the recipient should be obligated to inform such recipients of their obligation to retain the information in confidence. Here is sample contract language that will fulfill that purpose: "Each Recipient will ensure that its employees, agents and representatives also comply with the Recipient's obligations of confidentiality and non-use under this Agreement."

- **Exceptions to confidentiality:** Certain information is typically exempted from the coverage of a confidentiality agreement. For instance, here is a typical "exception" clause: "The obligations of confidentiality and non-use described above will not apply to information that (i) was already rightfully known to the Recipient on a non-confidential basis before the Effective Date; (ii) was independently developed by the Recipient; or (iii) is publicly available when received, or thereafter becomes publicly available through no fault of the Recipient or its employees, agents or representatives." Other exceptions to confidentiality coverage might include information obtained from a third party without obligation of confidentiality, or information disclosed by the discloser without obligation of confidentiality.

  A service provider or supplier might also want a confidentiality exception for "residual information." The supplier's programmers will inevitably learn skills through the work they perform for the agency, and it would be impossible to prevent them from using these skills. The supplier will not want to be liable for breach of contract as a result of the supplier's use of such residual information. Here is some suggested contract language to address this situation: "The recipient may disclose, publish, disseminate, and use the ideas, concepts, know-how and techniques, related to the Recipient's business activities, which are contained in the Discloser's information and retained in the memories of Recipient's employees who have had access to the information pursuant to this Agreement ("Residual Information"). Nothing contained in this Section gives Recipient the right to disclose, publish or disseminate, except as set forth elsewhere in this Agreement:

  1) the source of Residual Information;
  2) any financial, statistical or personnel data of the Discloser; or
  3) the business plans of Discloser."

  Such a clause allows the employees of the supplier to work with other agencies. It is also not a bad idea as a general rule from the agency's point of view, because the agency potentially receives the benefit of residual information that the supplier received from other agencies.

- **Disclosures required by law:** A party that is bound by a confidentiality agreement may find itself subject to a court order or a subpoena to disclose information that such party is contractually obligated not to disclose. Many confidentiality agreements

Agency procurements are subject to the Freedom of Information Act, with exceptions in the VPPA. The requirements of the Virginia Freedom of Information Act are more fully discussed in chapter 10 of this manual (insert link).

- **Duration of confidentiality obligation:** Many recipients of confidential information from suppliers seek to limit the length of their obligation not to disclose such information. One way to do this is to limit the term of the confidentiality obligation. Some agreements, for example, require the recipient of confidential information to regard the information as confidential for a period of one, two or three years. On the other hand, it may be very important to the discloser to preserve the confidentiality of the disclosed information indefinitely. This is an issue that the parties should consider based on the specific facts and needs of the parties.

- **Return of confidential materials:** The discloser of confidential information will want to include a clause requiring the recipient to return the confidential information to the discloser upon request. Here is an example of such a provision: "Upon the request of Discloser, Recipient will promptly return to Discloser all Confidential Information and all copies thereof in Recipient's possession or under Recipient's control, and Recipient will destroy all copies thereof on Recipient's computers, disks and other digital storage devices."

- When the confidentiality clause is part of a larger agreement, the agreement should provide that the confidential information will be returned to the discloser upon the expiration or termination of the agreement. The agreement should always provide that it will be governed by the laws of the Commonwealth of Virginia. In addition to the clauses described above, a confidentiality agreement might contain provisions to the effect that:

    - the discloser may obtain both injunctive relief and monetary damages in the event that the recipient fails to comply, and that the recipient will pay for the discloser's attorneys' fees;
    - a recipient in breach must indemnify if a third party sues the discloser due to the breach;
    - monetary liability for breach is limited to a specified dollar amount:
    - the disclosed information remains the property of the disclosing party;
    - the recipient shall immediately notify the discloser upon discovering any loss or unauthorized disclosure by any of the recipient's personnel of any confidential information;
    - each party shall comply with all applicable laws, rules and regulations, including those relating to technology export or transfer;
    - the discloser is disclosing the information "as is" or with implied or express warranties;
    - the discloser is granting no license;
    - the recipient is not restricted from providing competitive products or services to others;

- the recipient may not reverse engineer, decompile or disassemble any disclosed software;
- the recipient will not export any disclosed software in violation of any export laws;
- the parties will mediate and then arbitrate any dispute (with a carve-out for injunctions).

25.8.19 IT warranties

The IT contract should require the supplier to warrant that all equipment, software, systems installed meets the contract specifications. Suppliers' generally prefer to disclaim all implied warranties of merchantability and fitness for purpose in favor of specific repair or replace warranties that give little or no recourse to agencies. In order to protect the agency, the contract should either reinstate the implied warranties or avoid the supplier's implied warranty disclaimers by devising a format that exchanges supplier disclaimers for specific express warranties. For instance, include language such as "Should such product not perform as warranted, the supplier will be responsible for fixing and repairing the product and if the supplier fails to do so, the agency has the right to fine/penalize/get credit from the supplier, etc." All express and implied warranties should be clearly stated in the contract.

After the agency accepts the product, the agency usually has a warranty period during which the supplier is required to fix problems and provide some level of support. Warranty periods vary in length. They are frequently twelve months, although they may be as short as three months. Each VITA contract template includes warranty language adapted for the particular procurement type. After the warranty period expires, agencies commonly receive ongoing service through a maintenance agreement. Here is a sample warranty clause:

"For a period of ____ months from Agency's acceptance of the completed Software/Service/Solution (the "Warranty Period"), Supplier represents and warrants that such Software/Service/Solution will conform to all agreed-upon requirements. If, during that period, Agency notifies Supplier that the Software/Service/Solution does not conform to agreed-upon requirements, then Supplier promptly shall correct such nonconformities at no charge to Agency. If Supplier fails to correct any problem, programming error or bug reported during the Warranty Period within thirty days after receipt of notice, Agency may contract for such work to be done by any third party and Supplier shall reimburse Agency for the reasonable cost of such work."

Most agencies will want far more extensive warranties than merely a warranty that the product will conform to all agreed-upon requirements, and they will want warranties that last beyond the "warranty period". This is true especially in contracts in which the supplier prominently states that it makes no warranties other than those expressly set forth in the agreement. An agency that purchases a product or licenses software should also obtain a warranty from the supplier or licensor that the technology will not infringe on the rights of any third party. In addition to warranties that the product and all fixes and enhancements will conform to agreed-upon requirements and will not infringe the rights of any third party, an agency might require *express warranties* from the supplier that:

- The product and all enhancements and new versions will contain no known defects.
- Supplier has the right to enter into the agreement and to perform its obligations under the agreement.
- The agreement is its legal, valid and binding obligation.
- Neither supplier nor its employees have been or are the subject, directly or indirectly, of any governmental order, investigation or action of any kind, including without limitation any order or action to revoke or deny any export privileges, and supplier will notify

- Supplier's software, services or products shall not infringe on any third party's intellectual property rights, including, but not limited to patent, trademark, copyright or trade secret.
- Supplier is under no obligation or restriction, nor will it assume any such obligation or restriction, which would in any way interfere or be inconsistent with, or present a conflict of interest concerning, the services which are the subject of the agreement.
- Supplier's performance will not breach or conflict with any prior obligation of supplier to any other party, including any obligation to keep confidential any information acquired by supplier before the date of the agreement.
- Unless approved in advance by agency, no information supplier discloses to agency in providing the services that are the subject matter of the agreement will be confidential to supplier or any third party.
- The supplier, if a licensor, has the right to grant a license to the software free and clear of any liens and encumbrances.
- The supplier is not currently the subject of any litigation or pending claim that would materially affect the supplier's ability to perform.
- The fees and hourly rates set forth in Exhibit/Schedule __ are the best rates supplier offers to any of its customers.
- The software and all enhancements and new versions will contain no known computer virus or other "contaminants", including any codes or instructions that may be used to access, modify, delete, damage or disable agency's computer system, which shall include, but not be limited to, security or expiration codes.
- Licensor expressly waives and disclaims any right or remedy it may have at law or in equity to unilaterally de-install, disable or repossess the Software should Licensee fail to perform any of its obligations under this Agreement.
- In no event shall Licensor have the right to purposefully or accidentally electronically repossess the Software using "self-help" devices. For purposes of this Agreement, "repossess" shall include, but not be limited to, electronic lock-outs or booby traps.

When the supplier incorporates third party software into the software it is licensing or selling, the agency may want to include that the supplier must obtain comparable warranties from such third parties and shall assign such warranties to the agency. The supplier should also commit to cooperate with the agency in the enforcement of any such warranties. What about the term or survival of these warranties? While the warranty regarding the conformity of the software to the agreed-upon requirements may have a fixed term, for example, of twelve months, the agency may want the warranty against infringement to last indefinitely.

IT contracts may define levels of product errors and deal with each level in a different manner. For example, the contract might define a "fatal error" as one that results in the inability of a system to perform a vital business function of the agency (as further defined in the agreement). The contract might provide, for example, that if the agency discovers a fatal error within six months, then the supplier will handle the error in the same manner as it would handle infringement. In other words, the supplier would modify or replace the product, offer some workaround, or terminate the license and pay the agency the depreciated book value of the software. The agreement might provide that the licensor or supplier will use its best efforts to fix any error other than a fatal error.

25.8.20 IT indemnification

An agency that licenses or acquires technology from an IT supplier should include a provision in its IT contract for the supplier to indemnify the agency for claims from third parties arising out of the failure of any warranties or the supplier's breach of the agreement.

Here is a sample indemnity clause:

"Supplier agrees to indemnify, defend and hold harmless the Commonwealth, Agency, their officers, directors, agents and employees (collectively, "Commonwealth's Indemnified Parties") from and against any and all third party claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, assessments, fines, penalties (whether criminal or civil), judgments, settlements, expenses (including attorneys' and accountants' fees and disbursements) and costs (each, a "Claim" and collectively, "Claims"), incurred by, borne by or asserted against any of Commonwealth's Indemnified Parties to the extent such Claims in any way relate to, arise out of or result from: (i) any intentional or willful conduct or negligence of any employee, agent, or subcontractor of Supplier, (ii) any act or omission of any employee, agent, or subcontractor of Supplier, (iii) breach of any representation, warranty or covenant of Supplier contained herein, (iv) any defect in the Solution or the Services, or (v) any actual or alleged infringement or misappropriation of any third party's intellectual property rights by any of the Solution or Services. Selection and approval of counsel and approval of any settlement shall be accomplished in accordance with all applicable laws, rules and regulations."

"For state agencies the applicable laws include §§ 2.2-510 and 2.2-514 of the Code of Virginia. In all cases the selection and approval of counsel and approval of any settlement shall be satisfactory to Agency."

"In the event that a Claim is commenced against any of the agency's Indemnified Parties alleging that use of the Solution or any component or Services under Contract infringes any third party's intellectual property rights and the supplier believes that the allegations are not covered by the indemnification provision, Supplier shall immediately notify the agency in writing, specifying to what extent Supplier believes it is obligated to defend and indemnify under the Contract. Supplier shall in such event protect the interests of the agency's Indemnified Parties and secure a continuance to permit the agency to appear and defend its interests in cooperation with Supplier as is appropriate, including any jurisdictional defenses Agency may have."

"In the event of a Claim resulting from any actual or alleged infringement any third party's intellectual property rights by any of the Solution or Services, and in addition to all other obligations of Supplier in this Section, Supplier shall at its expense, either (a) procure for Agency the right to continue use of such infringing Solution or Services, or any component thereof; or (b) replace or modify such infringing Solution or Services, or any component thereof, with non-infringing products or services satisfactory to Agency. In addition, Supplier shall provide the agency with a comparable temporary replacement solution or reimburse the agency for the reasonable costs incurred by Agency in obtaining an alternative product in the event the agency cannot use the affected Solution. If Supplier cannot accomplish any of the foregoing within a reasonable time and at commercially reasonable rates, then Supplier shall accept the return of the infringing component of the Solution or Services, along with any other components of any products rendered unusable by Agency as a result of the infringing component, and refund the price paid to Supplier for such components."

From an agency's point of view, the following clause is a good starting point on the subject of a remedy for infringement:

"If a third party objects to Licensee's use of the [product or software], Licensee will notify Licensor immediately. Licensor shall assume the defense of any infringement litigation, with Licensee's cooperation, at Licensor's expense. In the event of any

such infringement, Licensor will either (a) obtain a license enabling the Licensee to continue using the software or (b) bring the infringement to an end by modifying the software or replacing it with other software that performs the same functions or (c) terminate the license upon notice to the Licensee, in which event Licensor shall pay Licensee the depreciated book value of license, based on a 5-year useful life, and Licensee shall return the Software and documentation and destroy all copies."

A provision placing liability on the supplier will not help the agency if the supplier does not have adequate resources to pay. Accordingly, the agency may want the supplier to carry insurance covering the indemnified risks. Agencies may want to require that suppliers provide proof of general liability insurance and professional liability coverage, naming the agency as additional insured. The contract should state the required limit of the policies (usually at least $1 million for each occurrence) and should require the supplier to produce certificates of insurance to show that the required policies are in effect. As an added protection, the agency may require that it be added as an additional named insured to the Supplier's insurance policy.

25.8.21 IT pricing

While the obligations of the IT supplier to the agency may be complex, the primary obligation of the agency is simple. The agency pays the supplier for its IT services or products. System development contracts are traditionally for large complex projects and commonly calling for progress payments. An agency can manage the risk of these projects by paying in increments based on project milestones, or holding back a portion of the fee until the software/system is deemed by the agency to be acceptable. In order to work within these constraints, IT suppliers are increasingly breaking projects into smaller chunks, covering shorter periods of time. Agencies may want to evaluate whether it would be more beneficial to pay a greater amount for the supplier's services in implementing the software, rather than for the software license itself.

Software license agreements may call for one-time payments or recurring payments, depending on whether the software license is viewed as a subscription or "paid-up." Maintenance fees are recurring regardless of whether the underlying license is paid-up one time or is an ongoing subscription, and may include additional hourly charges. Licensors typically charge 10-20 percent of the product price each year for on-going maintenance. The maintenance price should be based on the actual price paid for the software after all discounts and negotiations, rather than the list price, which usually will be significantly higher. IT agreements commonly list the amount of fees and the manner of payment in a schedule (exhibit) to the contract. The contract might state that the amounts set forth in the schedule will be effective for the first year after the contract is signed. The agency should strive for longer price protection than one year. If not, the supplier will want the right to increase its prices and rates after the first year and each year thereafter. If the agency agrees to any increases, they should be capped at a low fixed percentage or at a percentage based on published inflation indices, such as the Consumer Price Index. Here is language from VITA's "Solution" contract template:

"As consideration for the Solution and any additional products and Services provided hereunder, an Authorized User shall pay Supplier the fee(s) set forth on Exhibit B, which lists any and all fees and charges. The fees and any associated discounts shall be applicable throughout the term of this Contract; provided, however, that in the event the fees or discounts apply for any period less than the entire term, Supplier agrees that it shall not increase the fees more than once during any twelve (12) month period, commencing at the end of year one (1). No such increase shall exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City

Average, All Items, Not Seasonally Adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (http://www.bls.gov/cpi/home.htm), for the effective date of the increase compared with the same index one (1) year prior. Any such change in price shall be submitted in writing in accordance with the above and shall not become effective for sixty (60) days thereafter. Supplier agrees to offer price reductions to ensure compliance with the Competitive Pricing Section."

The agency should require adequate notice of any price increase so that the agency can replace the supplier if it finds the price to be too high. The agency may also want to include a general clause along the following lines: "For all services that Supplier performs for Agency, Supplier will charge only such amounts as are reasonable and customary. Supplier will not charge Agency more for any such service than Supplier's standard charges for similar services for other customers."

The first sentence above calls for fair prices. The agency will want to obtain quotes from other suppliers to be sure that the prices being requested by the supplier are fair. The second sentence is a most-favored-nation pricing clause and favors the agency. Practically speaking, only agencies that are in the best bargaining position will be able to obtain such a clause. In order to enforce this clause, an agency would want the right to inspect the supplier's books and records.

An easier clause to negotiate might be one that gives an agency the benefit of any better offer the supplier might make to any other public body in the Commonwealth. Here is a clause along these lines: "Licensor agrees that if any offer is made to or agreement entered into by Licensor with any other Commonwealth public body for substantially similar programs in substantially similar volume at a price less than the price to Licensee reflected in this Agreement, then the price reflected in this Agreement shall be reduced to such price offered to such public body."

Appendix A

Minimum VITA Requirements for Agency Delegated RFPs/Contracts

AREA	PROVISION	OBJECTIVE	(Agency Must Complete Prior to Review) What section/sub-section addressed in document	VITA comment, direction and/or recommended language
Intellectual Property	Warranty	Supplier has right to convey title/license free of claims of infringement, conversion by third parties.		
Intellectual Property	Indemnification	Supplier will indemnify, defend and hold CoV harmless against claims of infringement by third party. Indemnification is unilateral. The Commonwealth does not indemnify suppliers		
Intellectual Property	License Scope	Licenses should be perpetual, world-wide and transferable.		
Intellectual Property	License Scope	Software licenses should allow for: 1. use by agents/contractors; 2. is transferrable (ideally unlimited or at least among CoV agencies and to third party agents solely to serve CoV). If using VAR, then use EULA or similar modification to shrink-wrap license.		
Intellectual Property	Work Product	If engagement produces work product paid for by CoV, CoV ideally has ownership or at least worldwide, perpetual license to use and distribute source code without limitation. If work product contains pre-existing supplier IP, that IP ownership may be retained for only the pre-existing portion. Also, if the project uses federal funding, there may be intellectual property requirements.		

Limitations of liability		Supplier's liability for indemnification and confidentiality obligations are unlimited for both direct and consequential damages, in addition to commercial liability provisions.		
Mandatory terms	Core Contractual Terms	Should be incorporated by reference. Remove any duplication or full-text of same in agency contract template.		
Security terms	VITA's Information Security Policies & Guidelines	Should be incorporated by reference. These do not conflict with any agency-specific facility access requirements.		
Escrow		Escrow is optional for software based on criticality of the application, but, if included, SCM will review the escrow agreement. Source code should be released if supplier: 1. enters bankruptcy (include reference to §365 of Bankruptcy Code to keep outside of trusteeship); 2. becomes insolvent; 3. abandons support for the application.		
Warranties		In addition to commercial warranties, contract should include IT-specific warranties: 1. ownership of intellectual property (see above); 2. absence of malicious code in software; 3. non-infringement; 4. disclosure of open source.		
Performance / remedy		Intermediate remedies [other than outright termination] for breach, sub-standard performance should be included to give agency appropriate leverage with supplier.		

Transition period		As a best practice, contracts for technology services should provide for a post-contract transition period to support migration to a successor service or platform. Typically transition periods last up to 6 months, at the customer's discretion, but the term and scope of such a period are mission-dependent.		
Maintenance / upgrades		Software, hardware and occasionally service agreements that generate deliverables will require ongoing maintenance and support. Support provides trouble resolution, while maintenance typically includes product upgrades released by the vendor to its customers. Support typically includes response and resolution intervals with escalating remedies based on factors, such as repetition and severity. Support is often priced as a percentage of the purchase price; it should be calculated at the price after any discounts and typically falls in the range of 10%-20% of the purchase price. Although typically suppliers are allowed to increase support and maintenance costs, such increases should be capped on a year-to-year basis, using an absolute percentage cap (3%-5%) or inflation index.		

Notes:

1. This matrix provides guidance on those areas particular to information resource management that will be the focus of SCM's review of RFP and final contract documents under delegated procurements.

2. Additional guidance and sample contract language may be provided in the form of redlines on documents submitted to SCM.
3. This review is not intended to provide legal advice on general contract or RFP provisions. Questions of law or legal sufficiency should be submitted to the agency's supporting unit in the Office of the Attorney General.

Appendix B

Table of Contents from VITA's "Solution" Contract

This is an example of contents an IT contract where a "solution" (services and software) is acquired. It shows a thorough coverage of sound IT terms and conditions.

15. AUTHORIZED USER SELF-SUFFICIENCY
16. ESCROW AGREEMENT
17. COMPETITIVE PRICING
18. CONFIDENTIALITY
    A. Treatment and Protection
    B. Exclusions
    C. Return or Destruction
    D. Confidentiality Statement
19. INDEMNIFICATION AND LIABILITY
    A. Indemnification
    B. Liability
20. INSURANCE
21. SECURITY COMPLIANCE
22. IMPORT/EXPORT
23. BANKRUPTCY
24. GENERAL PROVISIONS
    A. Relationship Between VITA and Authorized User and Supplier
    B. Incorporated Contractual Provisions
    C. Compliance with the Federal Lobbying Act
    D. Governing Law
    E. Dispute Resolution
    F. Advertising and Use of Proprietary Marks
    G. Notices
    H. No Waiver
    I. Assignment
    J. Captions
    K. Severability
    L. Survival
    M. Force Majeure
    N. Remedies
    O. Right to Audit
    P. Offers of Employment
    Q. Contract Administration
    R. Entire Contract

Appendix C
Certification Regarding Lobbying

Obtain Supplier signature prior to contract award and place in the procurement file.
In original state it is an attachment to the solicitation.

ATTACHMENT --: CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

No Federal appropriated funds have been paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee or an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal Contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal Contract, grant, loan, or cooperative agreement.

If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

The undersigned shall require that the language of this certification be included in the award documents for all sub awards at all tiers (including subcontracts, sub grants, and Contracts under grants, loans and cooperative agreements) and that all sub recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____

Printed Name: _____

Organization: _____

Date: _____